BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUSSELL EFFENBECK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,897
GREAT BEND HUMANE SOCIETY	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 8, 2008 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Robert A. Anderson of Ellinwood, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held December 7, 2007, with attachments; and the documents filed of record in this matter, including, but not limited to, the joint letter of counsel to Aaron D. Sauer, D.C., dated January 7, 2008, and Dr. Sauer's reply letter of January 29, 2008. Both letters were delivered to, and filed with, the ALJ by transmittal letter from claimant's attorney dated January 31, 2008.

ISSUES

1. Has claimant proven that he suffered an accidental injury on May 21, 2007, which arose out of and in the course of his employment with respondent?

2. Did the injury suffered by claimant on May 23, 2007, arise out of and in the course of his employment with respondent?

Claimant alleges that he suffered an accidental injury arising out of and in the course of his employment on May 21, 2007, when, while pushing a lawn mower belonging to respondent out of flood water, he injured his low back. Respondent does not deny the lawn mower incident occurred, but denies the injury alleged to have occurred on May 21, 2007, actually happened.

Claimant then suffered a second injury on May 23, 2007, while walking down the hall at respondent's business. Respondent acknowledges that the incident on May 23, 2007, while claimant was walking down respondent's hall did occur, but argues the incident did not arise out of claimant's employment. Respondent contends the incident occurred while claimant was just walking and was a normal activity of daily living and did not occur due to any activity connected with claimant's employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

On May 21, 2007, claimant pushed a lawn mower out of flood water. This mower belonged to respondent, and the activity was witnessed by claimant's supervisor, Gale Broberg. Claimant testified that he injured his back while pushing the mower. Claimant also stated that he told Ms. Broberg that his back was sore and stiff. This was after pushing the mower. It is unclear from this record whether claimant told Ms. Broberg that his sore and stiff back was due to pushing the mower. Claimant sought no medical treatment after this incident.

On May 23, 2007, while walking down the hall at respondent's business, claimant experienced a sudden, sharp, excruciating pain down his right leg and right hip. There is no indication in this record that claimant tripped, slipped or fell on May 23. He was simply walking when the pain occurred. Claimant reported this incident to respondent and was taken to Aaron D. Sauer, D.C., of the Sauer Chiropractic & Sports Clinic for treatment. Claimant testified that he told Dr. Sauer of the lawn mower incident and the injury while walking down the hall. But the History Form filled out by Sandy Doonan of Dr. Sauer's office on May 29, 2007, displays an accident date of May 23, 2007, and both the History Form and the Work-Related Injury Questionnaire signed by claimant on May 29, 2007, display an injury description of the incident while claimant was walking. Neither document contains a description of an incident on May 21, involving a lawn mower. Claimant continued to receive treatments from Dr. Sauer through July 16, 2007, with no indication of any involvement with a lawn mower. On August 1, 2007, claimant typed a letter titled

"Report Of Accident" and submitted it to respondent.[1] This is the first written indication, in this record, that claimant was alleging a work-related injury on May 21, 2007, associated with moving the lawn mower.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

Claimant alleges an injury while working for respondent on May 21, 2007, when he pushed a lawn mower belonging to respondent out of flood waters. Claimant's testimony that he told his supervisor is uncontradicted by any respondent representative. But his allegations of an injury on May 21 are contradicted by contemporaneous medical records from Dr. Sauer. The medical reports generated by Dr. Sauer's staff from information provided by claimant do not support an accident on May 21. The injury questionnaire and history form both discuss the walking injury alleged on May 23, but neither discusses the alleged injury of May 21 with the lawn mower. Dr. Sauer does state, in his letter of January 29, 2008, that his CA had a conversation with claimant about the lawn mower, but does not detail when this conversation took place. Dr. Sauer also does not explain why that significant history was left out of the contemporaneous office forms. With this obvious discrepancy between claimant's allegations and the medical reports, the ALJ found claimant had failed to prove that the accident occurred. This Board Member agrees with the ALJ. It is difficult to comprehend how claimant could fail to identify such a significant event as pushing the lawn mower and the resulting injury when discussing the reason for the requested medical treatment with the doctor's staff. Claimant has failed to prove that

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[1] P.H. Trans., Cl. Ex. 1.

[2] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2006 Supp. 44-501(a).

he suffered an accidental injury arising out of and in the course of his employment with respondent on May 21, 2007.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]
>
> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[6]
>
> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[7]

Claimant alleges an aggravation of the May 21, 2007 injury on May 23, 2007, when, as he was walking down a hall at respondent's business, claimant suffered a sharp pain in his right leg and hip. There is nothing in this record indicating claimant slipped or tripped, and there was nothing on the floor or in the area which caused claimant's accident. He was just walking and the pain started. In *Johnson*, the claimant was standing to retrieve a file when she experienced severe pain in her left knee. The Kansas Court of Appeals found:

> Considering the facts of this case, we do not find substantial evidence to support the Board's finding that Johnson's act of standing up was *not* a normal activity of daily living.[8]

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

[7] *Id.* at Syl. ¶ 2.

[8] *Id*. at 789.

In *Johnson*, the claimant's act of standing was found to be a normal act of daily living. Here, the act of walking is also a normal act of daily living to which claimant was equally exposed apart from the employment.[9] Therefore, the injury suffered while claimant was walking down the hall is not an accident which occurred out of claimant's employment, and the denial of benefits by the ALJ should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent on either May 21, 2007, or May 23, 2007. Therefore, the denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated February 8, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

HONORABLE GARY M. KORTE

c: Robert A. Anderson, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[9] *Id*. at 789; citing *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

[10] K.S.A. 44-534a.